IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 87

TAMPA ELECTRIC COMPANY,
Petitioner,

v.

NASHVILLE COAL COMPANY, NASHVILLE COAL, INC. and WEST KENTUCKY COAL COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

WILLIAM C. CHANLER,
WINTHROP, STIMSON, PUTNAM & ROBERTS,
40 Wall Street,
New York 5, New York,
Attorney for Petitioner.

Of Counsel:
STEPHEN A. WEINER.

December 13, 1960.

INDEX

	PAGE
INTRODUCTORY	1
I. Respondent's sole attempt to meet the undeniable fact that the contract at bar does not preclude the purchaser from dealing in the goods of the seller's competitors is to quote from opinions dealing with the qualifying clause	4
II. Respondents also attempt to meet the conceded fact that the seller under the contract at bar had no such economic leverage as to enable it to impose a restrictive condition on the purchaser by quoting from opinions dealing with the qualifying clause	11
III. There is nothing in the legislative history of the Act to support respondents' contention that the statute was intended to reach a contract such as that at bar	14
IV. Respondents' argument in support of their contention that the contract at bar comes within the qualifying clause is based upon a plainly untenable concept of the market affected	17
V. Respondents fail to show why they should be permitted to assert their own wrongdoing under Section 3 to repudiate a contract petitioner wishes to enforce	21
VI. The contract at bar does not violate the Sherman Act	26
CONCLUSION	27

CITATIONS

Cases:

	PAGE
American Crystal Sugar Co. v. *Cuban American S. Co.*, 259 F. 2d 524 (2d Cir. 1958)	5
Beloit Culligan Soft Water Service, Inc. v. *Culligan, Inc.*, 274 F. 2d 29 (7th Cir. 1959)	25
Dictograph Products, Inc. v. *Federal Trade Commission*, 217 F. 2d 821 (2d Cir. 1954), *cert. denied*, 349 U. S. 940 (1955)	15
Doherty v. *Bartlett*, 81 F. 2d 920 (1st Cir. 1936), *cert. denied*, 298 U. S. 676 (1936)	25
Federal Trade Commission v. *Motion Picture Advertising Service Co.*, 344 U. S. 392 (1953)	12
Frost & Co., A. C. v. *Coeur D'Alene Mines Corp.*, 312 U. S. 38 (1941)	24
Kaiser-Frazer Corp. v. *Otis & Co.*, 195 F. 2d 838 (2d Cir. 1952), *cert. denied*, 344 U. S. 856 (1952)	25
Kelly v. *Kosuga*, 358 U. S. 516 (1959)	21
Northern Pacific Railway Co. v. *United States*, 356 U. S. 1 (1958)	14
Standard Fashion Co. v. *Magrane-Houston Co.*, 258 U. S. 346 (1922)	3, 8
Standard Oil Co. of California v. *United States*, 337 U. S. 293 (1949)	2, 3, 9, 11, 12, 13, 16, 18, 19
Times-Picayune Publishing Co. v. *United States*, 345 U. S. 594 (1953)	12, 13
United States v. *Columbia Steel Co.*, 334 U. S. 495 (1948)	26
United States v. *E. I. duPont de Nemours & Co.*, 351 U. S. 377 (1956)	5
United States v. *E. I. duPont de Nemours & Co.*, 353 U. S. 586 (1957)	18

PAGE

United States v. *United Shoe Machinery Co.*, 234 Fed. 127 (E. D. Mo. 1916), *aff'd*, 258 U. S. 451 (1922) 25

United States v. *United Shoe Machinery Co.*, 264 Fed. 138 (E. D. Mo. 1920), *aff'd*, 258 U. S. 451 (1922) 25

Statutes:

Clayton Act:
38 Stat. 731 (1914), 15 U.S.C. §14 (Section 3) 1, *et seq.*

Sherman Act:
26 Stat. 209 (1890), 15 U.S.C. §§1, 2 (Sections 1, 2) 26

Miscellaneous:

51 Cong. Rec. (1914) 15, 16, 17, 23

6 Corbin, *Contracts* (1951) 25

65 Harv. L. Rev. 913 (1952) 15

H. R. Rep. No. 1168, 63rd Cong., 2d Sess. (1914) 16

Public Utilities Fortnightly, September 1, 1960 7

S. Doc. No. 585, 63rd Cong., 2d Sess. (1914) 16

5 Williston, *Contracts* (Rev. ed. 1937) 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 87

TAMPA ELECTRIC COMPANY,

Petitioner,

v.

NASHVILLE COAL COMPANY, NASHVILLE COAL, INC. and WEST KENTUCKY COAL COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Introductory

Respondents' brief conclusively confirms our contention that prior to the decisions below, no contract even remotely resembling the contract at bar has ever been held invalid on the ground that it violated Section 3 of the Clayton Act. For every case relied on by respondents involving an alleged violation of that Section—or, in a Sherman Act case, of the "policy" laid down by that Section—features all three of the elements which, in combination, constitute the anti-competitive practices Congress sought to prohibit

by adopting Section 3: (1) In every case the contract is either based on an express condition that the purchaser will not deal in the goods of the seller's competitors, or is so drawn as in fact to prevent the purchaser from dealing in such goods under any circumstances;* (2) in every case the seller enjoyed a position of economic leverage sufficient to enable it to impose the restrictive condition on the purchaser; (3) every case deals with a general practice whereby a powerful seller sought to obtain control of the market for its goods by preempting as many key outlets for those goods as possible through the use of such contracts. Moreover, in every case it was the seller alone who was forbidden to enforce the contract.

Since none of these elements is present in the case at bar, it follows that respondents have not cited a single authority which by its holding supports their contention that the contract at bar violates Section 3. Moreover, when the many quotations from the opinions of this Court and other courts on which respondents rely are read in the context of the facts to which the opinions relate, it will readily be seen that they are completely inapplicable to the case at bar. For in every instance, the quotations are predicated upon the existence of all three of these elements.

Particularly, such an examination will disclose that in every case from which such quotations are drawn, there was no question but that the contract either in terms or in effect precluded the purchaser from dealing with the

---

* See, for example, *Standard Oil Co. of California* v. *United States*, 337 U. S. 293, 303-04 (1949) (hereinafter "*Standard Oil*"):

> "* * * a dealer who has entered into a requirements contract with Standard cannot consistently with that contract sell the petroleum products of a competitor of Standard's no matter how many pumps he has * * *."

seller's competitors, so that the only issue before the courts was whether the contract came within the qualifying clause—*i.e.*, whether the contract might "substantially lessen competition or tend to create a monopoly in any line of commerce" within the meaning of that clause.* Obviously, that question has no bearing on whether the contract is based upon a restrictive condition prohibited by the basic clause of the statute. Yet opinions dealing exclusively with the qualifying clause are repeatedly cited in support of respondents' contention that it is immaterial that the purchaser is free to deal in the goods of the seller's competitors, or that the seller had no such economic leverage as to enable it to impose an exclusive dealing condition on an unwilling purchaser.

While purporting to apply such quotations to the contract at bar, respondents' arguments in reality convert Section 3 into a law which would be unrecognizable either by the members of Congress who adopted it or by courts which have heretofore construed it. For under their theory, *any* contract for the sale of a substantial volume of goods would violate Section 3 even though the contract left the purchaser free to deal in the goods of

---

* See, for example, the following statements by this Court in two of the cases principally relied on by respondents:

> "Obviously the contracts here at issue would be proscribed if §3 stopped short of the qualifying clause. * * * It is the qualifying clause, therefore, which must be construed." *Standard Oil*, 337 U. S. at 297-98.

> "The covenant, read in the light of the circumstances in which it was made, is one by which the purchaser agreed not to sell any other make of patterns while the contract was in force. The real question is: Does the contract of sale come within the third section of the Clayton Act because the covenant not to sell the patterns of others 'may be to substantially lessen competition or tend to create a monopoly'." *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 355 (1922) (hereinafter *"Standard Fashion"*).

the seller's competitors, was desired by the purchaser, and had no more effect upon the market for the goods of the seller's competitors than any sale to one of their many potential customers would have.

I

Respondents' sole attempt to meet the undeniable fact that the contract at bar does not preclude the purchaser from dealing in the goods of the seller's competitors is to quote from opinions dealing with the qualifying clause.

Although recognizing, as they must, that the instant contract covers only the fuel requirements of two units of Gannon Station, one of petitioner's three integrated power-producing plants, for a twenty-year period, and of such other units as might be constructed at Gannon as coal-burning units during the first ten years of the contract term, respondents still ask this Court to declare that the contract comes within the statutory prohibition against making a contract of sale based on a "condition, agreement, or understanding that the * * * purchaser * * * shall not use or deal in the goods * * * of a competitor or competitors of the * * * seller." But nearly every argument they advance in support of this contention is based on the provisions, or this Court's construction of the provisions, of the qualifying clause that a contract based on such a restrictive condition is only unlawful when its effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

For example, in answer to our contention that petitioner is presently dealing in the goods of competitors of the seller by burning oil, concededly a competitor of coal, in its eleven oil-burning units, respondents contend that

"petitioner's use of oil in other facilities is irrelevant, since coal itself is a 'line of commerce'" (R. Br. p. 26).* In support of this contention, respondents state that "Section 3 forbids the foreclosure of 'a competitor or competitors of the lessor or seller . . . *in any line of commerce*'" (R. Br. p. 27) (Emphasis in original). This is a patent distortion of the language of the statute. The standard of illegality set forth in Section 3 is *not* that the contract shall preclude the purchaser from dealing with the seller's competitors "in any line of commerce." The standard of illegality is that the contract shall preclude the purchaser from dealing with the seller's competitors, period. The phrase "in any line of commerce" is found only in the qualifying clause. This provision of the statute is, of course, not even reached unless and until it is found that the contract in issue is based on the condition, agreement, or understanding prohibited by the basic clause.** Thus, even assuming that coal and oil are separate lines of commerce, which we deny,*** this conclusion is of no help whatsoever to respondents in their efforts to establish that

---

* The following references will be used herein:
P. Br.—Petitioner's main brief in this Court.
R. Br.—Respondents' brief in this Court.
R.—Printed record.

** The legislative history shows that the qualifying clause was added to Section 3 solely to *exempt* from the operation of the statute insubstantial contracts falling within the basic clause, not to add to the scope of its coverage. (See pp. 15-16, *infra*.)

*** Decisions of this Court, particularly *United States* v. *E. I. duPont de Nemours & Co.*, 351 U. S. 377 (1956), clearly establish the doctrine that the "line of commerce" is boiler fuels as a whole and not simply coal or oil, where such fuels are "reasonably interchangeable by consumers for the same purpose" (351 U. S. at 395). See also *American Crystal Sugar Co.* v. *Cuban American S. Co.*, 259 F.2d 524, 529 (2d Cir. 1958). We respectfully refer to the analysis of such cases in the dissenting opinion of Judge Weick below (R. 83-87).

this contract contains "a condition, agreement, or understanding that the * * * purchaser * * * shall not use or deal in the goods * * * of a competitor or competitors of the * * * seller."

Similarly, respondents seek to meet the incontrovertible fact that under the contract petitioner is free to burn coal purchased from their competitors in any generating unit not expressly covered by the contract, with the argument that "The contract covers *all* of petitioner's existing requirements of coal, for a 20 year period. The contract totally excludes, for 20 years, any competitor *from this huge market for coal,* which petitioner itself estimated would rise to 2,250,000 tons per year" (R. Br. p. 18).* Thus again, respondents seek to show that the contract comes within the basic prohibitory clause of Section 3 by showing that, according to them, the contract comes within the "substantiality" provision of the qualifying clause. The only authorities cited for this surprising proposition are the two decisions below in the instant case. We respectfully submit that those courts were led into error when they were persuaded to accept respondents' contention that the contract at bar is based on the condition that the purchaser will not deal in the goods of the seller's competitors because the amount of coal involved is "substantial."

Respondents also argue, as did the courts below, that the contract violates the provision against exclusive dealing because "there is nothing to indicate any planned or probable conversion of oil burning units into coal burning units or construction of coal burning units not covered

* Emphasis added here and throughout this brief unless otherwise indicated.

by the contract" (R. Br. p. 18). This is an obvious *non sequitur*. A contract under which the purchaser has the legal right to deal in the goods of the seller's competitors cannot be converted into a contract prohibiting such dealing by proof that the purchaser is not availing himself of that right.

Moreover, this proposition is contradicted by the record. As we pointed out in our main brief, during the pendency of this action Peabody Coal Company, a leading competitor of respondents, made an offer to supply coal for two of petitioner's oil-burning units if petitioner would convert them to coal.* This offer was rejected by petitioner solely because petitioner's oil supplier lowered its price to meet the threatened competition (P. Br. pp. 14-15). Manifestly, at any time one of respondents' competitors offers to sell coal to petitioner at a price and for a term of years which will make it economically advantageous for petitioner to convert its oil-burning units to coal, petitioner will accept that offer. It is the unhindered play of free competition, and not any restrictive provision of this contract, which is responsible for the fact that petitioner is not now purchasing coal from respondents' competitors.**

---

* There is absolutely no basis in the record for respondents' insinuations that petitioner "procured" the Peabody offer "after commencement of the litigation," presumably to bolster its legal position (R. Br. p. 18). On the contrary, the record shows that a proposed contract was mailed by the Vice President of Peabody to petitioner's Mechanical Engineer as a basis of discussion and negotiation (R. 33).

** It is also worthy of note that petitioner has recently announced plans to construct a new coal-burning power plant in addition to Gannon which is expected to begin actual operation in the late 1960's. See *Public Utilities Fortnightly*, September 1, 1960, p. 19. The instant contract will certainly not preclude petitioner from purchasing its coal requirements for that plant from respondents' competitors.

Respondents also seek to meet our contention that the contract at bar cannot violate the basic prohibitory clause of Section 3 by citing cases involving contracts which by their very terms were based on unlawful exclusive dealing conditions. For example, respondents quote a truncated excerpt from this Court's opinion in *Standard Fashion*, where the Court invalidated a contract which, like some 10,000 other contracts made with other retailers, provided that no other make of dress patterns could be sold "on the premises" (R. Br. p. 20). That this decision lends no support to respondents' contention that petitioner's right to use competitive fuels in other units is immaterial is immediately apparent when the portion of the opinion quoted in respondents' brief is read in context. The sentence immediately preceding the quoted portion reads as follows:

> "The contract required the purchaser not to deal in goods of competitors of the seller" (258 U. S. at 354).

Following the portion quoted by respondents, the Court concludes:

> "The covenant, read in the light of the circumstances in which it was made, is one by which the purchaser agreed not to sell any other make of patterns while the contract was in force" (258 U. S. at 355).

Obviously, no such agreement can be spelled out of the contract at bar.

Respondents further confuse the issue by citing cases which hold that a tying contract falls within the basic clause of Section 3, even though it appeared that the buyer could still use the goods of the seller's competitors if it obtained substitutes for the tying product from other suppliers (R. Br. pp. 20-21). The essence of a tying

contract is that the purchaser may use the tying product only on the condition that he will not use the goods of the seller's competitors in connection with that product. Thus, such a contract by *its express terms* is based on the restrictive condition declared unlawful by Section 3, and accordingly, is illegal *per se* (provided it comes within the qualifying clause). In contrast, nothing in Section 3 condemns contracts covering a defined portion of the buyer's requirements, and such an agreement comes within the scope of the statute only if, as in *Standard Oil,* it can be shown to be the equivalent of an express agreement not to deal in the goods of the seller's competitors. If, as in the instant case, the buyer is free to and does in fact deal with the seller's competitors, the inapplicability of the Clayton Act is readily apparent.

Nevertheless, respondents argue that "The principle of these [tying] cases is applicable to requirements contracts. This Court has held in *Standard Oil Co. of California, supra,* that no distinction is to be drawn in the tests to be applied under Section 3 between tying and requirements cases" (R. Br. pp. 21-22).

Here again, for the third time, respondents are attempting to prove that the contract at bar is the equivalent of a contract based on an exclusive dealing condition by quoting from an opinion dealing with the qualifying clause. An examination of this Court's opinion in *Standard Oil* to which respondents refer (337 U. S. at 305-08) will make it abundantly clear that the "tests" to which the Court was there referring were the tests established by prior decisions for determining whether the effect of a tying contract may be to "substantially lessen competition or tend to create a monopoly". The fact that this Court considered these tests relevant in determining whether a particular contract meets the provisions of that clause, regardless of whether it is a tying contract or a full require-

ments contract, obviously has no bearing on whether or not the contract in question is based upon an unlawful exclusive dealing condition.

The inevitable result of respondents' contentions is to bring within the reach of Section 3 every substantial contract for the sale of a fixed quantity of goods. For any such contract can be said to be based on the unlawful condition that the purchaser will not use the goods of the seller's competitors to the extent of the amounts covered by the contract in question. It cannot be denied that the instant contract "forecloses" competitors no more than a contract to supply annually, for a 20 year period, "X" tons for each of the first two units of Gannon Station, as well as such other coal-burning units as might be constructed at Gannon during the first ten years of the contract term. Moreover, as we pointed out in our main brief, on the basis of present operating conditions, the amount of tons represented by "X" can easily be computed (P. Br. pp. 18-19).

Respondents present no tenable answer to our contention that the contract at bar cannot come within the purview of Section 3, since it does not prevent the purchaser from dealing in the goods of the seller's competitors.

POINT II

Respondents also attempt to meet the conceded fact that the seller under the contract at bar had no such economic leverage as to enable it to impose a restrictive condition on the purchaser by quoting from opinions dealing with the qualifying clause.

In an effort to meet our contention that a contract cannot violate Section 3 when the seller had no such economic leverage as to enable it to impose any "requirements" provision on the buyer, respondents rely principally upon the proposition that in *Standard Oil* "the Court expressly recognized that the seller did not have a dominant position in the market" (R. Br. p. 37).

We submit that once more, respondents are seeking to apply this Court's observations as to the qualifying clause in support of their contention that the contract violates the prohibition against exclusive dealing conditions. As we read the opinion, the reference to Standard's lack of market dominance was made only in relation to the Court's consideration of the qualifying clause. The Court observed that several prior cases had "regarded domination of the market as sufficient in itself to support the inference that competition had been or probably would be lessened" (337 U. S. at 301). The Court then noted that that test was inapplicable to the case before it since "Standard's share of the retail market for gasoline • • • is hardly large enough to conclude as a matter of law that it occupies a dominant position • • •" (337 U. S. at 302). The Court concluded, however, "that the qualifying clause of §3 is [also] satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected" (337 U. S. at 314). In other words, under this

Court's decision in *Standard Oil*, the "test" of substantiality can be met either by proving that the seller dominates the market or by showing that "the affected proportion of • • • sales • • • is substantial" (337 U. S. at 314).

All of this has nothing to do with our contention regarding the necessity of economic leverage by the seller in determining whether the contract is based on the condition that the purchaser will not deal in the goods of the seller's competitors. On that issue, it is plain from Mr. Justice Frankfurter's dissenting opinion in *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U. S. 392, 402 (1953), that *Standard Oil* supports, rather than refutes, our contention:

> "The obvious bargaining power of the seller [in *Standard Oil*] *vis-a-vis* the retailer does not, so far as we are advised, have a parallel here. • • • In any event, in the *Standard Oil* case we recognized the discrepancy in bargaining power and pointed out that the retailers might still insist on exclusive contracts if they wanted."

Respondents also seek comfort from the portion of this Court's opinion in *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594 (1953), in which the Court was drawing a distinction between the proof required in order to invalidate a tying contract under the Sherman Act and the proof required in order to invalidate such a contract under Section 3 of the Clayton Act. Respondents quote the Court as saying that a contract comes within the Clayton Act either "[w]hen the seller enjoys a monopolistic position in the market for the 'tying' product, *or* if a substantial volume of commerce in the 'tied' product is restrained" (R. Br. p. 38). But once more respondents quote a portion of an opinion of this Court out of context.

The entire sentence, from which respondents have quoted only a part, reads as follows:

> "From the 'tying' cases a perceptible pattern of illegality emerges: When the seller enjoys a monopolistic position in the market for the 'tying' product, *or* if a substantial volume of commerce in the 'tied' product is restrained, a tying arrangement violates the narrower standards expressed in §3 of the Clayton Act *because from either factor the requisite potential lessening of competition is inferred*" (345 U. S. at 608-09) (First emphasis in original).

It seems to us that here Mr. Justice Clark, the author of the opinion, was merely reaffirming the conclusion reached in *Standard Oil*, to which we have just referred: That the qualifying clause of Section 3 was met by either test. In other words, for the fifth time respondents are attempting to establish that the contract at bar comes within the basic prohibition of Section 3 by reliance on a quotation dealing exclusively with the qualifying clause.

That Mr. Justice Clark was fully aware that economic leverage by a seller sufficient to enable him to impose the restrictive condition on the buyer was an essential element in any case involving such a condition is apparent from the following passages in his opinion in *Times-Picayune*: "By conditioning his sale of one commodity on the purchase of another, *a seller coerces the abdication of buyers' independent judgment* as to the 'tied' product's merits and insulates it from the competitive stresses of the open market" (345 U. S. at 605). And again: "The essence of illegality in tying agreements is the wielding of monopolistic leverage • • •" (345 U. S. at 611).

Respondents also argue that "as a practical matter" Section 3 should be as applicable to requirements contracts imposed on sellers by buyers, as *vice versa*

(R. Br. pp. 39-41). Particularly, they argue earnestly that coal producers in the "depressed coal industry" are or could be seriously injured by the imposition upon them of requirements contracts by powerful consumers of coal. If this is so, we suggest that they should request Congress to enact a new law providing that "It shall be unlawful for any person to purchase or contract for the purchase of all his requirements of a commodity from one seller." But that is not the kind of transaction which Section 3 was either designed or intended to prohibit. Nor do we believe the struggling coal producers would welcome such a statute.

We submit that Mr. Justice Black's observation in *Northern Pacific Railway Co.* v. *United States*, 356 U. S. 1, 6 (1958) that "Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint attributable to such tying arrangements would obviously be insignificant at most" is just as applicable to a requirements contract as to a tying contract, and regardless of whether it is attacked under the Sherman Act or the Clayton Act. Congress never intended to outlaw a contract whereby a consumer voluntarily contracted for the supply of a part of its requirements from a single supplier, and there is no reason why it should have.

POINT III

There is nothing in the legislative history of the Act to support respondents' contention that the statute was intended to reach a contract such as that at bar.

Respondents attempt to rebut our recitation of the legislative history of Section 3, which conclusively demon-

strates that the Act was not intended to apply to the instant contract, by asserting that this history shows "that the Section would also outlaw such [exclusive dealing] contracts if made by the 'small man'" (R. Br. p. 51). We have no quarrel with this proposition, for we do not deny that a small concern, by virtue of the control of a particularly desirable product or patent, might well be in a position to impose restrictive conditions upon its customers, and thus lessen competition or tend to create a monopoly. However, as Congressman Webb summarized the purpose of Section 3:

> "[The Section] prevents the manufacturer [whether large or small] from going to a little or big merchant and selling goods to him *on condition that that merchant shall sell only his goods and not sell the goods of any competitor* • • •" [I]t is a long step toward unfettering the little business man all over the country • • •." 51 Cong. Rec. 9407 (May 28, 1914).

But in any event, the various references to the plight of the "small man" contained in the legislative history quoted by respondents were made with regard to the House version of the bill, which flatly declared it to be a penal offense for a seller to make a sale or contract for sale upon the specified unlawful condition (see P. Br. p. 23). The Senate refused to support so drastic a statute because of the belief that "newcomers or small business enterprises in a particular line of commerce • • • could effectively compete with established interests only if these devices [of exclusive dealing] were available to them." *Dictograph Products, Inc.* v. *Federal Trade Commission*, 217 F. 2d 821, 827 (2d Cir. 1954), *cert. denied*, 349 U. S. 940 (1955); see 51 Cong. Rec. 14094, 14098, 14208, 14253, 14267 (1914); 65 Harv. L. Rev. 913, 934 (1952).

As a compromise between the House and Senate views, the qualifying clause was added in conference for the very purpose of protecting small dealers in minor transactions from too harsh an enforcement of the Act.* As Senator Walsh, one of the conferees, pointed out in explaining the purpose of the qualifying clause:

> "• • • it was found no easy task to frame a statute which would reach the case of a plundering monopolist which would not only not hamper many legitimate transactions but not be oppressive to a struggling industry contending for trade against a competitor enjoying a practical monopoly or one long established and supported by unlimited capital" (51 Cong. Rec. 16145).

There is nothing in the legislative history of Section 3, as quoted by respondents or as otherwise exists, which in any way contradicts our position that Congress did not intend to outlaw a contract to supply part of a public utility's fuel requirements, which was entered into on the basis of sound business considerations rather than any suggestion of economic coercion on the part of the seller.

Similarly, respondents assert that in enacting Section 3, "Congress was concerned not only with protecting consumers and buyers from exclusionary restrictions, but also with preserving the equal opportunity of all vendors to reach the market, free of exclusionary arrangements between any buyer and any seller" (R. Br. pp. 53-54). Clearly, when a buyer is compelled by a seller enjoying a position of economic leverage to enter into an exclusive dealing arrangement, economic injury may be inflicted not only on the buyer but also on competitors of the seller,

---

* See S. Doc. No. 585, 63rd Cong., 2d Sess. (1914); H. R. Rep. No. 1168, 63rd Cong., 2d Sess. (1914) (Conference Committee Report); *Standard Oil*, 337 U. S. at 312.

from whom the buyer might wish to purchase some part of its needs were it not forced to deal with one seller exclusively. However, these factors are not present, and thus Section 3 is not offended, when a purchaser for sound business reasons *voluntarily elects* to buy from one supplier. It was not the intent of Section 3 to force a purchaser to sprinkle his business among a large number of suppliers if he did not desire or it was not economically feasible for him to do so. Rather, Section 3 was designed to "give the people *the right of choice* as to what articles of merchandise they will use,"* a right which petitioner here exercised by voluntarily entering into the supply arrangement which respondents ask this Court to invalidate.

Apparently, respondents are asking this Court to promote a "share the business" philosophy which, whatever its merits, has not yet been adopted by Congress.

POINT IV

Respondents' argument in support of their contention that the contract at bar comes within the qualifying clause is based on a plainly untenable concept of the market affected.

After devoting considerable space to the proposition that a part of the fuel requirements of a single relatively small electric utility constitutes a "huge market" for the sale of coal (R. Br. p. 18), and dwelling at length on the dollar value and tonnage of those requirements (R. Br. pp. 32-35), respondents finally turn to the only relevant factor in this area of their case: the potential effect of the contract on the seller's competitors in the coal industry (R. Br. pp. 35-36). On this issue, as this Court pointed

* 51 Cong. Rec. 9554 (June 1, 1914).

out in respondents' favorite authority, *Standard Oil*, "quantitative substantiality" alone is not enough:

> "Although the effect on competition will be quantitatively the same if a given volume of the industry's business is assumed to be covered, whether or not the affected sources of supply are those of the industry as a whole or only those of a particular region, *a purely quantitative measure of this effect is inadequate* because the narrower the area of competition, the greater the comparative effect on the area's competitors. *Since it is the preservation of competition which is at stake, the significant proportion of coverage is that within the area of effective competition*" (337 U. S. at 299-300, n. 5).

As this Court later stated the same proposition, "substantiality can be determined only in terms of the market affected" (*United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 593 (1957)).

In a patent attempt to enlarge the "comparative effect" of this contract "on the area's competitors," respondents blandly assert that "the market in which this preclusive contract operates and from which it excludes 'a competitor or competitors of . . . the seller'" is to be measured by "the coal sold by all suppliers in Florida and Georgia" (R. Br. p. 36)*. This proposition is based upon two very obvious fallacies.

In the first place, it must be obvious that the "area of effective competition" or "market affected" is the area within which the seller and its competitors can sell their goods, and which any coal purchaser in Florida can, "as

---

* Apparently, respondents' sole reason for including Georgia is that so little coal was sold in Florida prior to the construction of the Gannon plant that the available figures published by the Bureau of Mines combine the two states (R. Br. p. 35, n. 18).

a practical matter, turn to" for its supplies (*Standard Oil*, 337 U. S. at 299, n. 5). But here it is expressly conceded that petitioner, which was to purchase coal from mines in western Kentucky under the instant contract (R. 5), could turn to "a host of sellers of coal other than the contracting party" located in coal-producing states east of the Mississippi River (R. Br. p. 31). Moreover, we think that the Court can take judicial notice of the fact that suppliers in that area, *i.e.*, respondents and their competitors, can and do sell coal in almost every portion of the United States east of the Rocky Mountains, if not beyond. Specifically, the 700 producers which respondents have admitted are able to sell coal to petitioner (R. Br. pp. 6, 9-10, 31) annually market an amount of coal one hundred times greater than the *maximum* tonnage to be sold in any year under the instant contract (P. Br. pp. 41-42). Thus it is absurd to talk about Florida as constituting the "market affected" by the contract at bar.*

Secondly, we would point out the utter fallacy of measuring the "area of effective competition", even if it could be limited to Florida, by the amount of coal now being sold in that state. The "coal market in Florida" (R. Br. p. 35) available to respondents' competitors is not the small portion in which coal has already gained a foothold by virtue of the instant contract, but the vast market represented by all fuel consumers in Florida. For now that

* Respondents refer to the fact that the "area of effective competition" in *Standard Oil* was limited to the "Western area" consisting of only seven states (R. Br. p. 36). But the market was so defined because that was the area in which Standard had its refineries and sold its petroleum products (337 U. S. at 295). Respondents market their coal in innumerable states besides Florida and Georgia, and *Standard Oil* conclusively demonstrates that the relevant market embraces all such states.

this contract has broken into oil's monopoly by demonstrating that coal can effectively compete with oil for the Florida boiler fuel business, the whole of that state has been opened to any of respondents' competitors who can successfully meet that competition. Thus, instead of "foreclosing" the "huge market" represented by this single power plant (which is not a market, although, like any other power plant, it concededly burns a lot of coal), this contract has opened up a market probably twenty times as "huge" to respondents' competitors, even in the small segment of the true market area which respondents consider relevant.* Moreover, under respondents' theory Section 3 would outlaw any contract which introduced a new commodity into an area where it had never been sold before. For at the time such a contract is entered into, the seller would have preempted 100% of the market for the new commodity in that area.

We think it is plain from the foregoing that the contract at bar does not and could not "substantially lessen competition or tend to create a monopoly in any line of commerce". But we would point out that none of respondents' attempts to bring the contract within that clause would even be relevant, if it were recognized that Section 3 was never intended to reach a contract whereby a single consumer arranges for the supply of his requirements from a single supplier (see P. Br. pp. 29-30).

---

* Respondents claim that the instant contract should be held illegal because "of the suppression of the opportunities of hundreds of willing competitors of the seller" (R. Br. p. 61).

POINT V

Respondents fail to show why they should be permitted to assert their own wrongdoing under Section 3 to repudiate a contract petitioner wishes to enforce.

Throughout their brief respondents contend that "if petitioner were granted relief, the 'judgment of the Court would itself be enforcing the precise conduct made unlawful by the [Clayton] Act' (*Kelly* v. *Kosuga*, 358 U. S. 516, 520 (1959)). That conduct is the performance of a contract foreclosing all competitors of the seller from any opportunity to supply the buyer's coal requirements for a period of 20 years" (R. Br. pp. 7, 15; see also R. Br. pp. 54-60).

But Section 3 does not declare any contract made in violation of its provisions to be unlawful or unenforceable. As this Court has repeatedly held in a long line of cases culminating in *Kelly* v. *Kosuga*, *supra*, "the Sherman Act's express remedies could not be added to judicially by including the avoidance of private contracts as a sanction" (358 U. S. at 519). Where a statute does not in terms invalidate a contract, the courts will only hold it unenforceable under very limited conditions. As Professor Williston states the rule:

> "It is commonly said that illegal bargains are void. This statement, however, is clearly not strictly accurate. • • • When relief is denied it is either because the plaintiff is a wrongdoer, and such a person the law does not aid, or, in exceptional cases, because the transaction is declared absolutely void by the law." 5 Williston, *Contracts* § 1630 (Rev. ed. 1937).

There is nothing inherently illegal about the contract at bar so far as petitioner is concerned. It is not unlawful for a buyer to elect to purchase his requirements from a single seller; even respondents do not contend that petitioner has violated Section 3 by making this contract. Nor is it unlawful for the seller to furnish those requirements at the agreed price, if the buyer so requests. If any illegality could be attributed to this contract, it would be the act of the seller in making and enforcing a contract containing the requirements provision. Thus it would be the seller, and the seller alone, who would be guilty of a wrongful act, if Section 3 could be said to have been violated.

While of course the seller will not be judicially permitted to enforce a condition prohibited by Section 3 against an unwilling purchaser, it does not follow that the seller can also take advantage of his own wrong to escape his contractual obligations towards a purchaser who desires that the contract be carried out. Thus there is no merit to respondents' contentions that a judgment in favor of petitioner will in any way result in the judgment of the Court "enforcing the precise conduct made unlawful by the Act." On the contrary, it would seem to us that it is the judgment below, which, by recognizing respondents' unlawful act as a ground for permitting them to repudiate this contract, gives judicial sanction to "the precise conduct made unlawful by the [Clayton] Act."

Respondents' excerpts from the statement of Congressman Floyd, intended to show a Congressional purpose to "void" a contract made in violation of Section 3, and accordingly render it unenforceable by an innocent purchaser (R. Br. p. 58), distort the meaning of that Con-

gressmen's remarks. The point to which Congressman Floyd was addressing himself was that the effectiveness of Section 3 would not be curtailed by excising the criminal sanctions which had originally been inserted to enforce that Section, and by instead providing merely that "it shall be unlawful" to "make a sale or contract for sale • • •" (See P. Br. p. 53). Thus Congressman Floyd outlined the consequences which would follow when a contract is made "in violation of any of these provisions":

> "What is it worth? *The maker of that contract* cannot enforce it in any court of law or equity. Is that not a strong and efficient remedy when the *injured party is seeking his rights against the offending corporation?*" 51 Cong. Rec. 16318 (Oct. 8, 1914)

Similarly, he pointed out that:

> "There is nothing in [Section 3] *in favor of the corporation whose contracts are declared void,* nothing in favor of any corporation violating the provisions of [Section 3], when you declare that every contract made involving the things herein prohibited is unlawful." 51 Cong. Rec. 16319 (Oct. 8, 1914)

It is apparent that Congressman Floyd was contending only that a contract made by a seller in violation of Section 3 would create no rights in the seller as the party violating that Section. Indeed, according to Congressman Floyd, the Section was enacted as an "advantage" to "the man who has been oppressed and is being oppressed by these corporations", *i.e.*, buyers whom Congress believed were being victimized by powerful sellers. (51 Cong. Rec. 16319 (Oct. 8, 1914))

Respondents also contend that to hold this contract enforceable by the purchaser, although not enforceable by a wrongdoing seller, will "create a new class of contracts unknown to our law—a contract binding upon one party but not the other. But obviously, such a 'contract' would be void for lack of mutuality" (R. Br. p. 59).

Surely counsel are aware of the many cases holding that a contract obtained by fraud is enforceable against the wrongdoer, but not enforceable by him against or over the opposition of the party (here the buyer) for whose benefit the law declares the act of the wrongdoer unlawful. The same principle is of course applied to contracts voidable by an infant as a party protected by the law, even though the other contracting party may be held to the contract if the infant so elects.

Indeed, the type of contract which respondents claim is "unknown to our law" was expressly established by this Court in the case of *A. C. Frost & Co.* v. *Coeur D'Alene Mines Corp.*, 312 U. S. 38 (1941). Plaintiff here sued to enforce an option which its assignor had received from defendant to purchase shares of defendant's treasury stock at a specified price. The defense was that the option contract was entered into by defendant in violation of the Securities Act of 1933, as the treasury stock to be sold thereunder was never registered under said Act, and accordingly the contract could not be enforced by the plaintiff. Although this Court assumed that a public offering of the optioned stock had taken place and thus registration was required, it unanimously reversed the court below and held the contract enforceable by the purchaser. The Court pointed out:

> "*No provision of the Act declares that* in the absence of registration, *contracts* in contemplation of or having relation to a public offering *shall be void*" (312 U. S. at 41).

Since "the clear legislative purpose [of the Securities Act] was *protection of innocent purchasers* of securities", the Court held that to deny plaintiff the right to enforce the contract "would probably seriously hinder rather than aid the real purpose of the statute" (312 U. S. at 43).

Similarly, "no provision of [Section 3] declares that • • • contracts • • • shall be void"* and as we have seen, the Section was adopted for the "protection of innocent purchasers."** Accordingly, the right of petitioner to enforce the instant contract is readily apparent. Moreover, it is clear from the *Frost* case that the plea of "lack of mutuality" cannot here be raised to defeat petitioner's claim. For even though, under *Frost*, a purchaser as an innocent party can enforce a contract to sell unregistered stock, clearly a seller who violated the law by entering into such a contract could *not* enforce it against a protesting purchaser. *Kaiser-Frazer Corp.* v. *Otis & Co.*, 195 F. 2d 838, 843-44 (2d Cir. 1952), *cert. denied*, 344 U. S. 856 (1952); *Doherty* v. *Bartlett*, 81 F. 2d 920 (1st Cir. 1936), *cert. denied*, 298 U. S. 676 (1936); 6 Corbin, *Contracts* § 1514, p. 978 (1951). Thus the *Frost* case shatters respondents' plea that "the contract cannot be legal as to the buyer, but illegal as to the seller" (R. Br. p. 58).

---

* As stated in *United States* v. *United Shoe Machinery Co.*, 264 Fed. 138, 171 (E.D. Mo. 1920), *aff'd*, 258 U.S. 451 (1922): "Section 3 of the Clayton Act does not declare 'any contracts and leases [prohibited by that section] to be void' • • •."

** "In enacting [Section 3 of] the Clayton Act, Congress had in mind the protection of dealers [*i.e.* purchasers]": *Beloit Culligan Soft Water Service, Inc.* v. *Culligan, Inc.*, 274 F. 2d 29, 35 (7th Cir. 1959). See also *United States* v. *United Shoe Machinery Co.*, 234 Fed. 127, 139, 140 (E.D. Mo. 1916), *aff'd*, 258 U.S. 451 (1922): "[T]he object of the statute • • • was for the protection of the lessees and indirectly the public; Congress evidently presuming that the lessees accepted these leases under duress. • • • [T]he lessees are not indispensable nor necessary parties to this action, as the relief prayed in the bill, if granted, *can in no wise affect them or their rights*, except that it may relieve them of an onerous, and, as the complaint alleges, illegal, burden."

Finally, respondents simply confuse the issue by their contention that to permit the buyer to enforce the instant contract would mean that "the selling company in an unlawful merger under Section 7 could nevertheless compel performance by the buyer, because the statute reads only that 'no corporation shall acquire'" (R. Br. pp. 58-59). Section 7 was *not* enacted to protect selling companies from acquiring companies. Thus, in contrast to the instant case, judicial enforcement against an acquiring company of a merger agreement made in violation of Section 7 would *not* enable a party for whose benefit the law was enacted to hold a wrongdoer to his bargain.

POINT VI

The contract at bar does not violate the Sherman Act.

Respondents' contention that a contract to supply part of the fuel needs of a single public utility serving 11% of the population of a single state constitutes "an unreasonable restraint" or creates a "monopoly" within the meaning of the Sherman Act (R. Br. p. 61) is so preposterous as not to warrant serious consideration. As we understand respondents' argument, it is predicated upon the fact that this contract illegally precludes competitors of the seller from supplying petitioner with the coal purchased from respondents, and gives respondents a "monopoly" of petitioner's coal business to the extent of the tonnage furnished by them.* We do not believe that

* The correct test for determining unreasonable restraint was stated by this Court in *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 527 (1948):

> "In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market."

this Court will permit the Sherman Act to wreck business by adopting respondents' logic, which would obviously invalidate every contract for the supply of a substantial quantity of goods.

CONCLUSION

The judgment of the United States Court of Appeals for the Sixth Circuit should be reversed and the case remanded to the United States District Court for the Middle District of Tennessee, with directions to grant petitioner's cross-motion for summary judgment and deny respondents' motion for summary judgment.

Respectfully submitted,

WILLIAM C. CHANLER,
WINTHROP, STIMSON, PUTNAM & ROBERTS,
40 Wall Street,
New York 5, New York,
Attorney for Petitioner.

Of Counsel:

STEPHEN A. WEINER.

December 13, 1960.

SUPREME COURT OF THE UNITED STATES

No. 87.—October Term, 1960.

Tampa Electric Company, Petitioner, v. Nashville Coal Company, et al.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[February 27, 1961.]

Mr. Justice Clark delivered the opinion of the Court.

We granted certiorari to review a declaratory judgment holding illegal under § 3 of the Clayton Act [1] a requirements contract between the parties providing for the purchase by petitioner of all the coal it would require as boiler fuel at its Gannon Station in Tampa, Florida, over a 20-year period. 363 U. S. 836. Both the District Court, 168 F. Supp. 456, and the Court of Appeals, 276 F. 2d 766, Circuit Judge Weick dissenting, agreed with respondent that the contract fell within the proscription of § 3 and therefore was illegal and unenforceable. We cannot agree that the contract suffers the claimed anti-trust illegality [2] and, therefore, do not find it necessary to

[1] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods . . . for use, consumption, or resale within the United States . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the . . . seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 15 U. S. C. § 14.

[2] In addition to their claim under § 3 of the Clayton Act, respondents argue the contract is illegal under the Sherman Act, 15 U. S. C. §§ 1–2.

consider respondents' additional argument that such illegality is a defense to the action and a bar to enforceability.

The Facts.

Petitioner Tampa Electric Company is a public utility located in Tampa, Florida. It produces and sells electric energy to a service area, including the city, extending from Tampa Bay eastward 60 miles to the center of the State, and some 30 miles in width. As of 1954 petitioner operated two electrical generating plants comprising a total of 11 individual generating units, all of which consumed oil in their burners. In 1955 Tampa Electric decided to expand its facilities by the construction of an additional generating plant to be comprised ultimately of six generating units, and to be known as the "Francis J. Gannon Station." Although every electrical generating plant in peninsular Florida burned oil at that time, Tampa Electric decided to try coal as boiler fuel in the first two units constructed at the Gannon Station. Accordingly, it contracted with the respondents [3] to furnish the expected coal requirements for the units. The agreement, dated May 23, 1955, embraced Tampa Electric's "total requirements of fuel . . . for the operation of its first two units to be installed at the Gannon Station . . . not less than 225,000 tons of coal per unit per year," for a period of 20 years. The contract further provided that "if during the first 10 years of the term . . . the Buyer constructs additional units [at Gannon] in which coal is used as the fuel, it shall give the Seller notice thereof two years prior to the completion of such unit or units and upon completion of same the fuel requirements thereof shall be added to this

[3] The original contract was with Potter Towing Company, and by subsequent agreements with Tampa Electric responsibility thereunder was assumed by respondent West Kentucky Coal Company.

contract." It was understood and agreed, however, that "the Buyer has the option to be exercised two years prior to completion of said unit or units of determining whether coal or some other fuel shall be used in same." Tampa Electric had the further option of reducing, up to 15%, the amount of its coal purchases covered by the contract after giving six months' notice of an intention to use as fuel a by-product of any of its local customers. The minimum price was set at $6.40 per ton delivered, subject to an escalation clause based on labor cost and other factors. Deliveries were originally expected to begin in March 1957, for the first unit, and for the second unit at the completion of its construction.

In April 1957, soon before the first coal was actually to be delivered and after Tampa Electric, in order to equip its first two Gannon units for the use of coal, had expended some $3,000,000 more than the cost of constructing oil-burning units, and after respondents had expended approximately $7,500,000 readying itself to perform the contract, the latter advised petitioner that the contract was illegal under the antitrust laws, would therefore not be performed, and no coal would be delivered. This turn of events required Tampa Electric to look elsewhere for its coal requirements. The first unit at Gannon began operating August 1, 1957, using coal purchased on a temporary basis, but on December 23, 1957, a purchase order contract for the total coal requirements of the Gannon Station was made with Love and Amos Coal Company. It was for an indefinite period cancellable on 12 months' notice by either party, or immediately upon tender of performance by respondents under the contract sued upon here. The maximum price was $8.80 per ton, depending upon the freight rate. In its purchase order to the Love and Amos Company, Tampa estimated that its requirements at the Gannon Station would be 350,000 tons in

1958; 700,000 tons in 1959 and 1960; 1,000,000 tons in 1961; and would increase thereafter, as required, to "about 2,250,000 tons per year." The second unit at Gannon Station commenced operation 14 months after the first, *i. e.*, October 1958. Construction of a third unit, the coal for which was to have been provided under the original contract, was also begun.

The record indicates that the total consumption of coal in peninsular Florida, as of 1958, aside from Gannon Station, was approximately 700,000 tons annually. It further shows that there were some 700 coal suppliers in the producing area where respondents operated, and that Tampa Electric's anticipated maximum requirements at Gannon Station, *i. e.*, 2,250,000 tons annually, would approximate 1% of the total coal of the same type produced and marketed from respondents' producing area.

Petitioner brought this suit in the District Court pursuant to 28 U. S. C. § 2201, for a declaration that its contract with respondents was valid, and for enforcement according to its terms. In addition to its Clayton Act defense, respondents contended that the contract violated both §§ 1 and 2 of the Sherman Act which, it claimed, likewise precluded its enforcement. The District Court, however, granted respondents' motion for summary judgment on the sole ground that the undisputed facts, recited above, showed the contract to be a violation of § 3 of the Clayton Act. The Court of Appeals agreed. Neither court found it necessary to consider the applicability of the Sherman Act.

Decisions of District Court and Court of Appeals.

Both courts admitted that the contract "does not expressly contain the 'condition'" that Tampa Electric would not use or deal in the coal of respondents' competitors. Nonetheless, they reasoned, the "total requirements" provision had the same practical effect, for it

prevented Tampa Electric for a period of 20 years from buying coal from any other source for use at that station. Each court cast aside as "irrelevant" arguments citing the use of oil as boiler fuel by Tampa Electric at its other stations, and by other utilities in peninsular Florida because oil was not in fact used at Gannon Station, and the possibility of exercise by Tampa Electric of the option reserved to it to build oil-burning units at Gannon was too remote. Found to be equally remote was the possibility of Tampa's conversion of existing oil-burning units at its other stations to the use of coal which would not be covered by the contract with respondents. It followed, both courts found, that the "line of commerce" on which the restraint was to be tested was coal—not boiler fuels. Both courts compared the estimated coal tonnage as to which the contract pre-empted competition for 20 years, namely, 1,000,000 tons a year by 1961, with the previous annual consumption of peninsular Florida, 700,000 tons. Emphasizing that fact as well as the contract value of the coal covered by the 20-year term, *i. e.*, $128,000,000, they held that such volume was not "insignificant or insubstantial" and that the effect of the contract would "be to substantially lessen competition," in violation of the Act. Both courts were of the opinion that in view of the executory nature of the contract, judicial enforcement of any portion of it could not be granted without directing a violation of the Act itself, and enforcement was, therefore, denied.[4]

Application of § 3 of the Clayton Act.

In the almost half-century since Congress adopted the Clayton Act, this Court has been called upon 10 times.[5]

[4] Cf. *Kelly* v. *Kosuga*, 358 U. S. 516.

[5] For discussion of previous cases, see *Standard Oil Co.* v. *United States*, 337 U. S. 293, 300-305.

including the present, to pass upon questions arising under § 3. *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346 (1922), the first of the cases, held that the Act "sought to reach the agreements embraced within its sphere in their incipiency, and in the section under consideration to determine their legality by specific tests of its own. . . ." In sum, it was declared, § 3 condemned sales or agreements "where the effect of such sale or contract . . . would under the circumstances disclosed, probably lessen competition, or create an actual tendency to monopoly." At pp. 356–357. This was not to say, the Court emphasized, that the Act was intended to reach every "remote lessening" of competition—only those which were substantial—but the Court did not draw the line where "remote" ended and "substantial" began. There in evidence, however, was the fact that the activities of two-fifths of the nation's 52,000 pattern agencies were affected by the challenged device. Then, one week later, followed *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451 (1922), which held that even though a contract does "not contain specific agreements not to use the [goods] of a competitor," if "the practical effect . . . is to prevent such use," it comes within the condition of the section as to exclusivity. At p. 457. The Court also held, as it had in *Standard Fashion*, *supra*, that a finding of domination of the relevant market by the lessor or seller was sufficient to support the inference that competition had or would be substantially lessened by the contracts involved there. As of that time it seemed clear that if "the practical effect" of the contract was to prevent a lessee or buyer from using the products of a competitor of the lessor or seller and the contract would thereby probably substantially lessen competition in a line of commerce, it was proscribed. A quarter of a century later, in *International Salt Co.* v.

United States, 332 U. S. 392 (1947), the Court held, at least in tying cases, that the necessity of direct proof of the economic impact of such a contract was not necessary where it was established that "the volume of business affected" was not "insignificant or insubstantial" and that the effect was "to foreclose competitors from any substantial market." At p. 396. It was only two years later, in *Standard Oil Co.* v. *United States*, 337 U. S. 293 (1949), that the Court again considered § 3 and its application to exclusive supply or, as they are commonly known, requirements contracts. It held that such contracts are proscribed by § 3 if their practical effect is to prevent lessees or purchasers from using or dealing in the goods, etc., of a competitor or competitors of the lessor or seller and thereby "competition has been foreclosed in a substantial share of the line of commerce affected." At p. 314.

In practical application, even though a contract is found to be an exclusive dealing arrangement, it does not violate the section unless the court believes it probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected. Following the guidelines of earlier decisions, certain considerations must be taken. *First*, the line of commerce, *i. e.*, the type of goods, wares, or merchandise, etc., involved must be determined, where it is in controversy, on the basis of the facts peculiar to the case.[6] *Second*, the area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies. In short, the threatened foreclosure of competition must

[6] See *International Boxing Club* v. *United States*, 358 U. S. 242.

be in relation to the market affected. As was said in *Standard Oil Co.* v. *United States, supra:*

> "It is clear, of course, that the 'line of commerce' affected need not be nationwide, at least where the purchasers cannot, as a practical matter, turn to suppliers outside their own area. Although the effect on competition will be quantitatively the same if a given volume of the industry's business is assumed to be covered, whether or not the affected sources of supply are those of the industry as a whole or only those of a particular region, a purely quantitative measure of this effect is inadequate because the narrower the area of competition, the greater the comparative effect on the area's competitors. Since it is the preservation of competition which is at stake, the significant proportion of coverage is that within the area of effective competition." At p. 299, note 5.

In the *Standard Oil* case, the area of effective competition—the relevant market—was found to be where the seller and some 75 of its competitors sold petroleum products. Conveniently identified as the Western Area, it included Arizona, California, Idaho, Nevada, Oregon, Utah and Washington. Similarly, in *United States* v. *Columbia Steel Co.*, 334 U. S. 495 (1948), a § 1 Sherman Act case, this Court decided the relevant market to be the competitive area in which Consolidated marketed its products, *i. e.*, 11 Western States. The Court found Consolidated's share of the nationwide market for the relevant line of commerce, rolled steel products, to be less than ½ of 1%, an "insignificant fraction of the total market," at p. 508; and its share of the more narrow but only relevant market, 3%, was described as "a small part," at p. 511, not sufficient to injure any competitor of United States Steel in that area or elsewhere.

Third, and last, the competition foreclosed by the contract must be found to constitute a substantial share of the relevant market. That is to say, the opportunities for other traders to enter into or remain in that market must be significantly limited as was pointed out in *Standard Oil Co.* v. *United States, supra*. There the impact of the requirements contracts was studied in the setting of the large number of gasoline stations—5,937 or 16% of the retail outlets in the relevant market—and the large number of contracts, over 8,000, together with the great volume of products involved. This combination dictated a finding that "Standard's use of the contracts [created] just such a potential clog on competition as it was the purpose of § 3 to remove" where, as there, the affected proportion of retail sales was substantial. At p. 314. As we noted above, in *United States* v. *Columbia Steel Co., supra*, substantiality was judged on a comparative basis, *i. e.*, Consolidated's use of rolled steel was "a small part" when weighed against the total volume of that product in the relevant market.

To determine substantiality in a given case, it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein. It follows that a mere showing that the contract itself involves a substantial number of dollars is ordinarily of little consequence.

The Application of § 3 Here.

In applying these considerations to the facts of the case before us, it appears clear that both the Court of Appeals and the District Court have not given the required effect

to a controlling factor in the case—the relevant competitive market area. This omission, by itself, requires reversal, for, as we have pointed out, the relevant market is the prime factor in relation to which the ultimate question, whether the contract forecloses competition in a substantial share of the line of commerce involved, must be decided. For the purposes of this case, therefore, we need not decide two threshold questions pressed by Tampa Electric. They are whether the contract in fact satisfies the initial requirement of § 3, *i. e.*, whether it is truly an exclusive dealing one, and, secondly, whether the line of commerce is boiler fuels, including coal, oil and gas, rather than coal alone.[7] We, therefore, for the purposes of this case, assume, but do not decide, that the contract is an exclusive dealing arrangement within the compass of § 3, and that the line of commerce is bituminous coal.

Relevant Market of Effective Competition.

Neither the Court of Appeals nor the District Court considered in detail the question of the relevant market. They do seem, however, to have been satisfied with inquiring only as to competition within "Peninsular Florida." It was noted that the total consumption of peninsular Florida was 700,000 tons of coal per year, about equal to the estimated 1959 requirements of Tampa Elec-

[7] In support of these contentions petitioner urges us to consider that it remains free to convert existing oil-burning units at its other plants to coal-burning units, the fuel for which it would be free to purchase from any seller in the market; also that just as it is permitted to use oil at its other plants, so too, it may construct all future Gannon units as oil-burners; and that in any event it is free to draw a maximum of 15% of its Gannon fuel requirements from by-products of local customers. Petitioner further argues that its novel reliance upon coal in fact created new fuel competition in an area that theretofore relied almost exclusively upon oil and, to a lesser extent, upon natural gas.

tric. It was also pointed out that coal accounted for less than 6% of the fuel consumed in the entire State.* The District Court concluded that though the respondents were only one of 700 coal producers who could serve the same market, peninsular Florida, the contract for a period of 20 years excluded competitors from a substantial amount of trade. Respondents contend that the coal tonnage covered by the contract must be weighed against either the total consumption of coal in peninsular Florida, or all of Florida, or the Bituminous Coal Act area comprising peninsular Florida and the Georgia "finger," or, at most, all of Florida and Georgia. If the latter area were considered the relevant market, Tampa Electric's proposed requirements would be 18% of the tonnage sold therein. Tampa Electric says that both courts and respondents are in error, because the "700 coal producers who could serve" it, as recognized by the trial court and admitted by respondents, operated in the Appalachian coal area and that its contract requirements were less than 1% of the total marketed production of these producers; that the relevant effective area of competition was the area in which these producers operated, and in which they were willing to compete for the consumer potential.

We are persuaded that on the record in this case, neither peninsular Florida, nor the entire State of Florida, nor Florida and Georgia combined constituted the relevant market of effective competition. We do not believe that the pie will slice so thinly. By far the bulk of the overwhelming tonnage marketed from the same producing area as serves Tampa is sold outside of Georgia and Florida, and the producers were "eager" to sell more coal in

---

* Oil and, to a lesser extent, natural gas are the primary fuels consumed in Florida.

those States.[9] While the relevant competitive market is not ordinarily susceptible to a "metes and bounds" definition, cf. *Times-Picayune Pub. Co.* v. *United States*, 345 U. S. 594, 611, it is of course the area in which respondents and the other 700 producers effectively compete. *Standard Oil Co.* v. *United States*, *supra*. The record shows that like the respondents, they sold bituminous coal "suitable for [Tampa's] requirements," mined in parts of Pennsylvania, Virginia, West Virginia, Kentucky, Tennessee, Alabama, Ohio and Illinois. We take notice of the fact that the approximate total bituminous coal (and lignite) product in the year 1954 from the districts in which these 700 producers are located was 359,289,000 tons, of which some 290,567,000 tons were sold on the open market.[10] Of the latter amount some 78,716,000 tons were sold to electric utilities.[11] We also note that in 1954 Florida and Georgia combined consumed at least 2,304,000 tons, 1,100,000 of which were used by electric utilities, and the sources of which were mines located in no less than seven States.[12] We take further notice that the production and marketing of bituminous coal (and lignite) from the same districts, and assumedly equally available to Tampa on a commercially feasible basis, is currently on a par with prior years.[13]

[9] Peabody Coal Company offered to supply petitioner with coal from its mines in western Kentucky, for use in the units at another of its Florida stations and that offer prompted a renegotiation of the price petitioner was paying for the oil then being consumed at that station.

[10] U. S. Bureau of the Census. I U. S. Census of Mineral Industries: 1954, Series: MI-12B, p. 4 (1957).

[11] *Id.*, at 12B-6.

[12] 1,569,000 tons from counties in West Virginia, Virginia, Kentucky, Tennessee and North Carolina; 412,000 tons from counties in Alabama, Georgia and Tennessee; the balance was produced in other counties in West Virginia, Virginia and western Kentucky. *Id.*, at 12B-10.

[13] United States Dept. of Interior, Bureau of Mines, II Minerals Yearbook (Fuels), 1959.

In point of statistical fact, coal consumption in the combined Florida-Georgia area has increased significantly since 1954. In 1959 more than 3,775,000 tons were there consumed, 2,913,000 being used by electric utilities including, presumably, the coal used by the petitioner.[14] The coal continued to come from at least seven States.[15] From these statistics it clearly appears that the proportionate volume of the total relevant coal product as to which the challenged contract pre-empted competition, less than 1%; is, conservatively speaking, quite insubstantial. A more accurate figure, even assuming pre-emption to the extent of the maximum anticipated total requirements, 2,250,000 tons a year, would be .77%.

Effect on Competition in the Relevant Market.

It may well be that in the context of antitrust legislation protracted requirements contracts are suspect, but they have not been declared illegal *per se*. Even though a single contract between single traders may fall within the initial broad proscription of the section, it must also suffer the qualifying disability, tendency to work a substantial—not remote—lessening of competition in the relevant competitive market. It is urged that the present contract pre-empts competition to the extent of purchases worth perhaps $128,000,000,[16] and that this "is,

---

[14] United States Dept. of Interior, Bureau of Mines, Mineral Market Report, M. M. S. No. 3035, p. 23 (1960). These statistics were taken from sources cited by respondents.

[15] 1,787,000 tons from certain counties in West Virginia, Virginia, Kentucky, Tennessee and North Carolina; 1,321,000 tons from counties in Alabama, Georgia and elsewhere in Tennessee; 665,000 tons from the western Kentucky fields; 2,000 tons from other counties in West Virginia and Virginia. *Ibid.*

[16] In this connection we note incidentally that in *Appalachian Coals, Inc.*, v. *United States*, 288 U. S. 344, 369 (1933), cited by respondents, Chief Justice Hughes quoted testimony showing that in 1932 it was nothing those days "for one interest or one concern to buy several mil-

of course, not insignificant or insubstantial." While $128,000,000 is a considerable sum of money, even in these days, the dollar-volume, by itself, is not the test, as we have already pointed out.

The remaining determination, therefore, is whether the pre-emption of competition to the extent of the tonnage involved tends to substantially foreclose competition in the relevant coal market. We think not. That market sees an annual trade in excess of 250,000,000 tons of coal and over a billion dollars—multiplied by 20 years it runs into astronomical figures. There is here neither a seller with a dominant position in the market as in *Standard Fashions, supra;* nor myriad outlets with substantial sales volume, coupled with an industry-wide practice of relying upon exclusive contracts, as in *Standard Oil, supra;* nor a plainly restrictive tying arrangement as in *International Salt, supra.* On the contrary, we seem to have only that type of contract which "may well be of economic advantage to buyers as well as to sellers." *Standard Oil Co.* v. *United States, supra,* at p. 306. In the case of the buyer it "may assure supply" while on the part of the seller it "may make possible the substantial reduction of selling expenses, give protection against price fluctuations, and . . . offer the possibility of a predictable market." *Id.,* at 306–307. The 20-year period of the contract is singled out as the principal vice, but at least in the case of public utilities the assurance of a steady and ample

---

lion tons of coal." At n. 7. The findings of the District Court showed that one utility consumed 2,485,000 tons of coal a year. Other concerns had requirements running from 30,000 to 250,000 tons while a textile manufacturer used 600,000 tons. At p. 370, n. 8. The Chief Justice also stated in his opinion that within 24 counties in Kentucky, Tennessee (in both of which respondents operate) and their competitive States of Virginia and West Virginia "there are over 1,620,000 acres of coal bearing land, containing approximately 9,000,000,000 net tons of recovable coal . . . ." At p. 369.

supply of fuel is necessary in the public interest. Otherwise consumers are left unprotected against service failures owing to shut-downs; and increasingly unjustified costs might result in more burdensome rate structures eventually to be reflected in the consumer's bill. The compelling validity of such considerations has been recognized fully in the natural gas public utility field. This is not to say that utilities are immunized from Clayton Act proscriptions, but merely that, in judging the term of a requirements contract in relation to the substantiality of the foreclosure of competition, particularized considerations of the parties' operations are not irrelevant. In weighing the various factors we have decided that in the competitive bituminous coal marketing area involved here the contract sued upon does not tend to foreclose a substantial volume of competition.

We need not discuss the respondents' further contention that the contract also violates § 1 and § 2 of the Sherman Act for if it does not fall within the broader proscription of § 3 of the Clayton Act it follows that it is not forbidden by those of the former. *Times-Picayune Pub. Co.* v. *United States, supra,* at pp. 608–609.

The judgment is reversed and the case remanded to the District Court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that the District Court and the Court of Appeals correctly decided this case and would therefore affirm their judgments.